

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 6
Justice

----- Index No. 5352/04
CINDY KELLNER,

Plaintiff,

SUA SPONTE ORDER

-against-

KALIBER FINANCING, INC.,
Defendant.

The Court, sua sponte, recalls its decision/order dated April 2, 2009, and hereby issues the following decision/order in its place.

After inquest held on January 28, 2009 and based upon the credible testimony and admissible evidence adduced therein, the court finds as follows:

I. INTRODUCTION

This is a personal injury action in which plaintiff Cindy Kellner (hereinafter "plaintiff") seeks money damages from Kaliber Financing, Inc. (hereinafter "defendant") for injuries she sustained on October 17, 2003 as a result of her walking down a flight of stairs in defendant's premises and being caused to fall approximately 14 steps, sustaining injury to her right ankle all due to defendant's negligence. A trial before a jury was held on the issue of liability on February 9, 2007. The jury rendered a verdict in favor of plaintiff finding that defendant was 100% liable for the damages to the plaintiff. The jury was then disbanded and the case was adjourned for a trial on damages for a date to be set by the court in the future. A date was then set for the damages trial, but the trial was adjourned at the request of the defendant. After multiple subsequent adjournments at the request of the defendant, the court marked the case final for trial on January 28, 2009. On that date, corporate defendant Kaliber Financing Inc. failed to appear by attorney and the court proceeded to inquest, as the corporate defendant failed to appear by representation of an attorney as required under the Judiciary

Law §§ 47 and 48.¹

At the inquest, plaintiff was the sole witness. She testified and submitted into evidence various medical records describing her alleged injuries and medical treatment. After the inquest, the court directed plaintiff to submit a post trial memorandum by March 3, 2009. In addition to the memorandum of law, plaintiff submitted the affirmed medical report of Dr. Robert S. Goldstein and the unaffirmed medical report of Dr. Eric L. Freeman, two consulting physicians. Plaintiff demands damages in the total amount of \$1,322,391.85: \$750,000.00 for past pain and suffering; \$500,000.00 for future pain and suffering; \$50,000.00 for lost income; and \$22,391.85 as reimbursement for her medical treatment.

II. FINDINGS OF FACT

Plaintiff, who was 37 years old at the time of the accident, testified that on October 17, 2003, she was walking down a flight of stairs at the defendant's premises when she was caused to fall approximately 14 steps. As she was falling, she heard her right ankle crack. She testified the pain she felt after the fall was "extremely painful . . . excruciating. . .I'll never forget it." She testified that immediately after the accident she went to a medical office next to defendant's premises where she was treated by Dr. Michael Alleye, a chiropractor. Later that evening, plaintiff traveled by taxi to North Shore University Hospital where she was treated in the emergency room and diagnosed as having a fractured right ankle.

The plaintiff next came under the care of Drs. Jeffrey Shapiro and Edward L. Mills, her treating orthopedic surgeons. On October 24, 2003, at North Shore University Hospital, plaintiff underwent a surgical operation by Dr. Mills involving open reduction internal fixation to her right ankle. As a result of the surgery, permanent hardware is inserted into plaintiff's right ankle consisting of a 6-hole semitubular plate, with a lag screw fixation in the fibular and 2 cannulated screws on the medial side. In addition, as a result of the surgical incisions from the operation, the plaintiff was left with significant scarring at two locations on her right ankle.

¹The court notes that Kawall Deosaran, an officer of defendant Kaliber Financing Inc. did appear as an officer of the corporation, but was not permitted to represent as the attorney for corporate defendant Kaliber Financing Inc.

After the operation, plaintiff remained in the hospital for four (4) days until October 29, 2003 when she was released. Plaintiff was non-weight bearing for approximately 10 weeks, had to use a wheelchair and crutches to ambulate, and had to reside at her parent's home as she required assistance with her care. During this period she had to use a shower chair to bathe herself and had to wrap her ankle. Plaintiff also underwent five months of one-hour sessions, three times a week of physical therapy consisting of use of electrodes, exercising in a pool, stretching and use of equipment to flex her ankle.

At the time of trial, she testified that she still experiences pain every day and has to constantly move her leg. Kellner testified that the pain she experiences everyday varies in degrees. She described the pain level during the day while she is at work as being 7 out of 10 and with increased intensity at night to 9-9.5 out of 10. To relieve pain while sitting, she often at work has to use pillows to keep her leg elevated or at home in the evening must raise her leg up on the couch. She testified that as a result of the injury to her ankle she is not able to participate in or enjoy physical activities she engaged in prior to her injury (i.e., running, biking, walking on the beach, bowling, snow-boarding, and skiing). Due to her inability to participate in these activities, she testified she has gained 28 pounds. Plaintiff further testified that her ankle injury has restricted her from performing daily household chores, often requiring her to seek the assistance of a maintenance person to perform simple tasks such as changing a light bulb.

III. DISCUSSION

Under CPLR 4518(c), medical records are admissible as evidence as long as they are duly certified, sworn or affirmed (Grasso v. Angerami, 79 NY2d 813, 814 [1991]; Laguerre v. Chavarria, 41 AD3d 437 [2d Dept 2007]). Here, plaintiff submitted certified, affirmed or sworn medical and hospital records, the affirmed medical reports of consulting Dr. Robert S. Goldstein, specialist in orthopedic medicine and the unsworn medical report of Dr. Eric L. Freeman. The medical report of Dr. Freeman cannot be considered by this court because it is unsworn and thus of no probative value (Laguerre v. Chavarria, *supra*; Felix v. New York City Tr. Auth., 32 AD3d 527, 528 [2d Dept 2006]; Yakubov v. CG Trans. Corp., 30 AD3d 509 [2d Dept 2006]). In Dr. Goldstein's affirmed report dated February 17, 2005 which report is based on an orthopedic examination performed on February 17, 2005, he concludes that the October 13, 2003

accident caused plaintiff permanent injuries, to wit, bimalleolar fracture of the right ankle requiring open reduction and internal fixation with plate and screws, that plaintiff has residual pain, swelling and restricted motion in her right ankle as a result of the accident; that the hardware can be removed from the right ankle which may offer plaintiff some pain relief, but it will not increase her range of motion and that plaintiff's prognosis is poor for any further improvement.

Accordingly, based upon plaintiff's testimony, and the admitted medical records and reports the court finds that plaintiff has suffered a permanent injury as a result of the accident on October 17, 2003

A. DAMAGES

Having determined plaintiff suffered a permanent injury, the court must next determine an appropriate measure of damages. "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount of granting the plaintiff an 'open season' at the expense of a defaulting defendant' (citations omitted)." ([Neuman v. Greenblatt, 260 AD2d 616 \[2d Dept 1999\]](#)).

1. Damages for past and future pain and suffering

The measure of damages for pain and suffering is the fair and reasonable compensation in light of all evidence in the case ([Tate v. Colabello, 58 NY2d 84 \[1983\]](#)). A fair interpretation of the evidence presented in this case and a review of the range of damages awarded in cases in which similar or analogous injuries were sustained support a damages award of \$350,000.00 for past pain and suffering and \$500,000.00 for future pain and suffering (see, [Lowenstein v. Normandy Group, LLC, 51 AD3d 517 \[1st Dept 2008\]](#) [jury verdict of \$300,000.00 for past pain and suffering upheld and \$1.5 million award for future pain and suffering over 28 years was held excessive to the extent that it exceeded \$850,000.00 for plaintiff sustained a bi or trimalleolar ankle fracture treated with open reduction and internal fixation, and a three-part shoulder fracture treated with immobilization and as a result was hospitalized for 12 days, received in-patient care at a rehabilitation facility for four weeks, had to reside with a relative for about three months before returning home, was unable to work for 18 months, continued to suffer constant sharp ankle pain, had a reduced range of motion and an inability to return to recreational activities]; [Patterson v. Kummer Development Corp., 302 AD2d 873 \[4th Dept 2003\]](#) [jury verdict of \$750,000.00 for past pain and suffering reduced to \$500,000.00

and \$500,000.00 award for future pain and suffering upheld for plaintiff sustained a fracture of his right heel bone, which did not require surgery, and a fracture dislocation of his left ankle, including the distal tibia and fibula, which required two surgeries and the insertion of a plate and two screws, was in extreme pain after the accident and after both surgeries, and at the time of trial still experienced pain in both feet, which increased in intensity when standing or walking for prolonged periods of time, could not take long walks, had a permanent partial disability, including a 35% loss of use of his right foot and a 60% loss of use of his left foot and ankle, would develop post-traumatic arthritis that would worsen over time, along with the pain in his feet, and would eventually require surgery to alleviate the pain]; [Ruiz v. Hart Elm Corp., 44 AD3d 842 \[2d Dept 2007\]](#) [jury verdict of \$500,000.00 for past pain and suffering and \$400,000.00 award for future pain and suffering upheld not excessive for plaintiff, a 22 year-old woman who sustained injuries including a severe bi-malleolar ankle fracture which required her to undergo three surgeries]; [Ruiz v. NYCTA, 44 AD3d 331 \[1st Dept 2007\]](#) [jury verdict of \$1.1 million which included \$350,000.00 for past pain and suffering and \$750,000.00 award for future pain and suffering over 34 years held excessive and reduced to \$300,000.00 for plaintiff, a 46 year-old woman who sustained a fractured right ankle, for which she underwent surgery involving open reduction and internal fixation with a plate and screws, resulting in hospitalization for a week and an uncomplicated recovery with few limitations other than an inability to walk long periods of time and some occasional pain that she treated with over-the-counter medications].

2. Damages for lost income and earnings

Plaintiff testified and submitted evidence that established that at the time of the accident, she was employed as a mortgage underwriter, earning approximately \$95,000.00 per year. Her W-2 showed that she earned \$69,187.28 in 2003 which represented her earnings for the year until the time of the accident. This amount calculates to an average weekly salary of approximately \$1,774.00. As Kellner was totally disabled from work for 6.5 months (28 weeks) after the accident, her loss of earnings total \$49,672.00. In addition, after plaintiff returned to work, as a result of the physical limitations of her injury, she was not able to work overtime, and to earn bonuses as she was able to prior to the accident, resulting in additional lost income. Accordingly, plaintiff requests and the court awards \$50,000.00 as reimbursement for her lost income.

3. Other Damages

The plaintiff submitted evidence demonstrating that she has a Workers' Compensation lien with Chubb & Son in the amount of \$22,391.85 in medical and \$30,750.00 for indemnity for a total of \$53,141.85. Accordingly, plaintiff requests and the court awards \$22,391.85 as reimbursement for medical treatment.

IV. CONCLUSION

Accordingly, after inquest, this court awards damages in the total amount of \$922,391.85: \$350,000.00 for past pain and suffering; \$500,000.00 for future pain and suffering; \$50,000.00 for lost income; and \$22,391.85 as reimbursement for her medical expenses with interest from February 9, 2007, the date of the liability jury verdict.

The County Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for plaintiff.

Dated: September 10, 2009

Howard G. Lane, J.S.C.